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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE PATERNITY OF D.S.,	)	
	)	
ROBERT E. SUMMERVILLE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 02A03-0604-JV-170
	)	
KIMIYA S. BROOKS,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
Cause No. 02C01-0111-JP-505

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Robert E. Summerville ("Father") appeals the dismissal of his petition to change custody of his son, D.S., from D.S.'s maternal grandmother, Jessica Brooks, ("Grandmother") to himself. Father agreed in June of 2002 that Grandmother was *de facto* custodian and should be given "joint legal and sole physical custody" of D.S. (App. at 115.) We therefore cannot conclude the court erred by labeling Grandmother *de facto* custodian. However, the court applied the wrong legal standard for determining whether to modify custody. In this situation, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

Kimiya Brooks ("Mother") gave birth to D.S. on September 25, 2000. On November 28, 2001, Mother filed a petition to establish paternity and child support. Father's paternity was established on January 24, 2002. Mother and Father were given joint legal custody of D.S., with Mother having primary physical custody, and child support was established.

On October 24, 2002, Mother was incarcerated. Father "was unable to assume physical custody of D.S., when [Mother] was arrested and incarcerated, because he did not have adequate housing or income to immediately provide for the child's welfare." (Appellant's Br. at 3.) Grandmother filed a motion to intervene in the paternity action. On June 12, 2003, by agreement of the parties, the trial court granted Grandmother's motion to intervene, declared her a *de facto* custodian of D.S., awarded joint legal custody of D.S. to Grandmother, Father, and Mother, and gave Grandmother primary physical custody of D.S.

On December 6, 2004, Father filed a motion to modify custody of D.S. based on Father's changed circumstances: a new, higher-paying job, a new home, and a wife who stayed at home with their children. The court held a hearing on the petition. After Father presented his case in chief, Grandmother moved for involuntary dismissal under Ind. Trial Rule 41(B), on the ground Father had not proven the change in circumstances necessary for a change in custody. The court granted Grandmother' motion, thereby denying Father's motion for change of custody.

Because the court's order did not include the specific findings and conclusions properly requested by Father prior to the hearing, Father filed a motion to correct error. When the court denied that motion, Father filed a supplemental motion to correct error. Thereafter, the court entered an order that provided the following relevant findings and conclusions:

> **FINDINGS OF FACT**
>
> 1. The Judge takes judicial notice of the prior findings and orders in this cause of action.
> 2. The child, [D.S.], was born September 25, 2000 and, at the time of trial on March 17, 2006, is five (5) years old.
> 3. This court established paternity of the minor child on January 24, 2002 inter alia granting the [Mother], and [Father], joint custody. Mother was granted primary physical custody of [D.S.]. (Exhibit 1)
> 4. On February 12, 2003, Mother and Father appeared in person and agreed that [D.S.] should continue to reside in the residence of [Grandmother]. Father's support was abated, forthwith.
> 5. Thereafter, on June 12, 2003, with agreement of both parents, the court ordered [G]randmother joined as a party and as de facto custodian of [D.S.] with joint legal custody. Father was ordered to pay support to [G]randmother forthwith.
> 6. On December 6, 2004, Father filed his Verified Petition to Modify Order of Paternity as to Custody, (emphasis supplied). Father did not seek relief from the court's order dated June 12, 2003 joining grandmother as de facto custodian with joint legal custody.

7. Mother had been committed to Rockville Women's Prison of the Indiana Department of Correction, was released in 1998 but has been returned to custody prior to October, 2002, when Mother, with Father's consent and acquiescence, temporarily placed [D.S.] in the primary physical custody and residence of grandmother, pending Mother's release in 2008.

8. Mother objects to Father being awarded sole custody of [D.S.] and does not relinquish her custodial rights to Father.

9. [D.S.] has a brother [D.B.] born March 5, 2002, who has also resided with grandmother since [Mother's] incarceration in October, 2002.

10. At all times in question, Father has exercised liberal parenting time with [D.S.] since grandmother became de facto custodian.

11. When Mother placed [D.S.] with grandmother, and at the time this court ordered grandmother as de facto custodian, Father was not stable enough to care for [D.S.].

12. [D.S.] and his half-brother, [D.B.], reside together in the home of grandmother and, since October, 2002, are bonded.

13. Grandmother has taken [D.S.] regularly to visit his mother and continues to maintain [D.S.'s] relationship with his mother.

14. Primary physical custody and residence in the home of grandmother is least disruptive to [D.S.] and promotes stability to [D.S.]'s education, socialization and sense of community.

CONCLUSIONS OF LAW

* * * * *

3. The parties agreed and the court ordered grandmother de facto custodian on June 12, 2003, with joint legal custody and sole physical custody as both a matter of law and the agreement of Mother and Father. Ibid, Section 2.5.

4. There is not a presumption favoring either parent. Ibid, Section 2. Neither Mother nor grandmother as de facto custodian wish to, nor intend to, relinquish or acquiesce in changing the primary physical custody and residence of [D.S.] with grandmother.

5. Father has not shown a right to relief upon the Pretrial Order, the weight of the evidence, and the law. Ibid, Section 2 and 2.5. Trial Rule 41(B).

6. The court determines that there is insufficient evidence of a substantial and continuing circumstance or fact to establish Father's right to relief on his Verified Petition to Modify Order of Paternity as to Custody filed December 6, 2004 or to modify this court's prior orders granting grandmother joint legal and physical custody as de facto custodian on February 12, 2003, and June 12, 2003, respectively, and the same is denied.

(Appellant's App. at 57-59.)

DISCUSSION AND DECISION

1. Grandmother's Status

Father first claims the court erred in labeling Grandmother a *de facto* custodian because she did not meet the legal requirements of the statute. We will not address that argument as the alleged error was invited by Father and not appealed at the appropriate time.

The trial court's order on June 12, 2003, provided in pertinent part:

> [Mother] appears in custody and by counsel. Father appears in person. Hearing held. By agreement, Maternal Grandmother, Jessica Brooks, is ordered made a party to this cause as de facto custodian of minor child, [D.S.], and is awarded joint legal custodian [sic] with both [Mother] and [Father].

(Appellant's App. at 84.) Father agreed Grandmother would be *de facto* custodian; thus, he invited the error he alleges and may not now challenge it.[1] *See Balicki v. Balicki*, 837 N.E.2d 532, 541 (Ind. Ct. App. 2005) (declining a husband's invitation to find error in the court's consideration of two assets as marital property, as the husband had listed those two assets as marital property subject to division on his proposed property division), *trans. denied* 855 N.E.2d 997 (Ind. 2006). Even if Father did not intend to consent to Grandmother being *de facto* custodian, he may not now challenge that status because he failed to appeal the trial court's order of June 12, 2003. *See* Ind. App. R. 9(A) (providing thirty days for filing of Notice of Appeal after judgment).

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[1] "The doctrine of invited error is grounded in estoppel and precludes a party from taking advantage of an error that he or she commits, invites, or which is the natural consequence of his or her own neglect or misconduct." *Balicki v. Balicki*, 837 N.E.2d 532, 541 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 997 (Ind. 2006).

2. Motion to Dismiss

Father claims the court erred when it dismissed his petition to modify custody.[2] Trial Rule 41(B) provides:

> After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

Under that rule, the trial court may weigh evidence, determine the credibility of witnesses, and decide "whether the party with the burden of proof has established a right to relief." *Barger v. Pate*, 831 N.E.2d 758, 761 (Ind. Ct. App. 2005).

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[2] In his Statement of the Issues Presented for Review, Father lists as two of his four issues whether the court erred by denying his motion to correct error and his supplemental motion to correct error. In the Argument section of his brief, Father discusses together all four of his issues. His references to those two motions indicate they contained arguments regarding only: (1) the court's failure to provide findings of fact and conclusions of law, and (2) the erroneous grant of Grandmother's Trial Rule 41(B) motion. Because Father's Appendix does not contain a copy of either of those pleadings and he did not address any other arguments in his brief, he has waived errors that may have been raised in those motions to the trial court. *See* Ind. App. R. 46(A)(8)(c).

As for his argument regarding the failure to include findings and conclusions in its initial order granting Grandmother's motion to dismiss, the court eventually entered an order in accordance with Father's request, and we consider those findings and conclusions as we review the court's dismissal under T.R. 41(B). Accordingly, we need not reverse or remand for that reason.

To the extent Father challenged the validity of the court's grant of Grandmother's T.R. 41(B) motion, the court apparently denied Father's motions to correct error. We review the denial of a motion to correct error for an abuse of discretion. *Walker v. Kelley*, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004). An abuse of discretion occurs if the decision was against the logic and effect of the facts and circumstances before the court or if the court misapplied the law. *Id.* The court would have abused its discretion in denying Father's motion if it erred when it granted Grandmother's T.R. 41(B) motion to dismiss.

When we review the grant of a motion under T.R. 41(B), we must determine whether the court's judgment is clearly erroneous. *Id.* Where, as here, the court entered findings and conclusions under T.R. 52 pursuant to Father's request, we first determine whether the evidence supports the findings, and then determine whether the findings support the judgment. *Id.* at 762. We will not set aside the findings or judgment unless either is clearly erroneous. *Id.* Findings are clearly erroneous if "the record lacks any evidence or reasonable inferences to support them," while a judgment is clearly erroneous if "unsupported by the findings of fact and the conclusions relying on those findings." *Id.*

A little over one year ago, we were asked "to reconcile the presumption that custody with the parent is in the child's best interest with the longstanding concept that 'permanence and stability are considered best for the welfare and happiness of the child.'" *In re Paternity of Z.T.H*, 839 N.E.2d 246, 252 (Ind. Ct. App. 2005) (quoting *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992)). We determined:

> [A] burden shifting approach is the most appropriate way to protect parental rights and the best interests of the child.
>
> First, in keeping with [*In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002), *reh'g denied*],[3] we conclude that when a parent seeks to modify

[3] In *B.H.*, our Indiana Supreme Court held:

> To resolve the dispute in the caselaw regarding the nature and quantum of evidence required to overcome this [parental] presumption, we hold that, before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because a third party could provide the better things in life for the child. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the

> the long-term permanent custody of a third party, the third party must rebut the parental presumption with 'evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third party.' *B.H.*, 770 N.E.2d at 287. If the third party is able to rebut the parental presumption with clear and convincing evidence, the third party is essentially in the same position as any custodial parent objecting to the modification of custody. In other words, the third party and the parent are on a level playing field, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child's best interests and that there has been a substantial change in one or more of the enumerated factors.
>
> This two-step approach protects a parent's constitutional rights and the child's best interests. Contrary to the parties' arguments and the trial court's conclusions, we do not agree that an either/or approach sufficiently satisfies both goals.

Id. at 252-53 (footnote added).

The trial court's fourth conclusion indicates it believed there was "not a presumption favoring either parent." (Appellant's App. at 115.) While this may be the standard for an initial custody determination between D.S.'s biological parents, it is not an accurate statement of the law governing Father's motion to change custody from Grandmother to himself because Grandmother is a third party. *See Z.T.H*, 839 N.E.2d at 252-53. That Grandmother was named a *de facto* custodian does not alter our analysis. *See In re Guardianship of L.L.*, 745 N.E.2d 222, 230 (Ind. Ct. App. 2001) (explaining

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> child and the third person, would of course be important, but the trial court is not limited to these criteria. The issue is not merely the fault of the natural parent. Rather it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review. A generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such a determination, and detailed and specific findings are required.

B.H., 770 N.E.2d at 287 (internal quotations and citations omitted).

why the statutes regarding *de facto* custodians could not have been intended to remove the constitutionally-created parental presumption), *trans. denied sub nom. Froelich v. Clark*, 753 N.E.2d 17 (Ind. 2001).

The remainder of the court's conclusions do not address whether Grandmother rebutted the "parental presumption." Without such a finding the court should not have moved to the second step of the analysis, which was to determine, as it did, whether Father demonstrated a substantial change in circumstances and that modification was in D.S.'s best interests. If, as Father argues, Grandmother did not rebut the presumption in his favor, then he should have been given custody of D.S. Accordingly, we must reverse the dismissal of Father's petition to modify custody and remand for further proceedings, at which Grandmother will have the burden to rebut the presumption favoring Father.

Reversed and remanded.

NAJAM, J., concurs.

MATHIAS, J., concurring with separate opinion.

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Appellant,	)	
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vs.	)	No. 02A03-0604-JV-170
	)	
KIMIYA S. BROOKS,	)	
	)	
Appellee,	)	

MATHIAS, J., concurring

I write separately to concur for several reasons.

First, it is tempting to affirm the trial court in all respects. To begin with, a trial court is almost always in the best position to judge the merits of any controversy, and this is especially so in child custody matters where the intangibles of the parties' prior contact with the judicial system and of witness and party credibility are so crucial to a just result that is in the best interest of the child(ren) involved. In addition, the trial judge here made findings of fact that bear on the issues that concern us under In re Paternity of Z.T.H. and In re Guardianship of B.H., namely, the bonding of D.S. in Grandmother's home and with his half-brother, D.B., for whom Grandmother also cares.

Because of those findings, it is also tempting to ignore the well-settled standard of proof in custody proceedings, clear and convincing evidence, and the need for a third-party custodian, like Grandmother in this case, to rebut the custodial presumption in favor of either of the child's parents. But we should not do so and we cannot do so, even with abundant confidence in our trial courts. Standards of proof and presumptions that are subject to rebuttal are among the most important safeguards of justice and of public confidence in the integrity and impartiality of our judicial system.

For all of these reasons, I concur in Judge May's thoughtful and well-reasoned opinion.